

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARTHROCARE CORPORATION,

Plaintiff,

v.

GYRUS MEDICAL, INC., GYRUS ENT, L.L.C.,
and GYRUS ACMI, INC.,

Defendants.

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C.A. No. 07-729-SLR

JURY TRIAL DEMANDED

DEFENDANTS' RESPONSE TO JUNE 30, 2008 ORDER

Defendants inform the Court that they do not intend to present witnesses at the July 17, 2008 evidentiary hearing for the following reasons:

1. Defendants' management personnel who participated in meetings with Weil Gotshal, Messrs. Roy Davis and Simon Shaw (*see*, e.g., Exhibit 1 to the Opening Brief in Support of the Motion to Disqualify), are no longer in the employ of defendants due to the Olympus acquisition, and are thus not available to testify and cannot be compelled to attend the hearing.
2. Olympus employees have relevant information, including that defendants' accused products and technology were discussed with members of the New York City office of the Weil Gotshal firm, but revealing the substance of those discussions may be construed as a waiver of the attorney-client privilege as to all Olympus/Weil Gotshal communications regarding the Gyrus acquisition, which privilege Olympus is not willing to waive at this time. Further, Weil Gotshal had asked Olympus to waive the attorney-client privilege as to Weil Gotshal's communications with Olympus to defend against the motion, but Olympus denied that request. *See* Exhibits 9 and 10 to the Reply Brief in Support of the Motion to Disqualify. Defendants

believe that it would be unfair for defendants to use the communications as a "sword," when Weil Gotshal was precluded from using the communications as a "shield."

The June 30, 2008 Order states that defendants' Motion to Disqualify (D.I. 14) "shall be denied without further order" if defendants decide to not present witnesses at the July 17, 2008 hearing. Defendants respectfully submit, however, that additional evidence is not necessary for defendants to prevail on the motion. Defendants stand on the evidence presented with their briefs that establishes that: (a) there is a conflict between Weil Gotshal's concurrent representations of (1) Olympus in the Gyrus acquisition and subsequent related activities and (2) ArthroCare in this litigation; and (b) information relevant to this case was disclosed to Weil Gotshal in its representation of Olympus.

Respectfully submitted,

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Dated: July 10, 2008
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on July 10, 2008, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on July 10, 2008, the attached document was Electronically Mailed to the following person(s):

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